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No. 86-1419

In the Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF OREGON, DEPARTMENT OF HUMAN RESOURCES, ET AL., PETITIONERS

v.

COOS BAY CARE CENTER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Section 1902(a)(13)(A) of the Social Security Act, 42 U.S.C. (& Supp. III) 1396a(a)(13)(A), requires States that elect to participate in the Medicaid program to submit to the Secretary of Health and Human Services, and have approved, a plan for medical assistance that "provide[s] for payment * * * of the hospital, skilled nursing facility, and intermediate care facility services * * * through the use of rates (determined in accordance with methods and standards developed by the State * * *) which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate * * *." The question presented is whether a health care provider and individual patients may bring an action under 42 U.S.C. 1983 to challenge a State's failure to make certain Medicaid payments, in purported violation of 42 U.S.C. (& Supp. III) 1396a(a)(13)(A).

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INTEREST OF THE UNITED STATES

Medicaid is a cooperative federal-state program "providing federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons" (*Harris* v. *McRae*, 448 U.S. 297, 301 (1980)). In developing plans for administering the Medicaid program, States are given considerable discretion in determining who will receive Medicaid assistance and what kinds of assistance will be provided. State Medicaid plans, however, must comply with requirements imposed by the Act and by the Secretary of Health and Human Services. 42 U.S.C. (& Supp. III) 1396a.

The court of appeals has held that a health care provider and certain individual patients may bring an action under 42 U.S.C. 1983 to challenge a State's alleged failure to provide sufficient Medicaid reimbursement, in purported violation of 42 U.S.C. (& Supp. III) 1396a(a)(13)(A). The United States has a significant financial stake in the disposition of that issue. By law, the federal government

provides between 50% and 83% of the cost of patient care, as determined by a formula keyed to per capita income. See 42 U.S.C. (& Supp. III) 1396d(b). In fiscal year 1986 alone, the federal contribution to the Medicaid program for medical assistance totalled $23.4 billion, making Medicaid one of the largest items in the federal budget.[1] Beyond this, the federal government makes at least a 50% contribution to the States' administrative expenses under the Medicaid program—including the cost of defending actions, like this one, for purported violations of the Social Security Act. See 42 U.S.C. 1396b(a)(7). In fiscal year 1986, the United States covered approximately $1.25 billion of state administrative costs.[2]

The United States also has a substantial interest in the particular legal question presented here. The Medicaid statute requires States to establish administrative procedures that afford providers and recipients an opportunity to challenge reimbursement decisions. See 42 U.S.C. 1396a(a)(3) and (37)(B); 42 C.F.R. 447.253(c), 431.220 *et seq.* Under the court of appeals' decision, however, persons may bypass state administrative procedures entirely, in favor of a federal-court action under Section 1983. That result, if upheld by this Court, would have a significant impact on the Medicaid program. It would enable thousands of routine cases like the present one—involving a claim that the State failed to make adequate reimbursement to a health care provider and its patients—to be brought in federal court. Such an explosion of litigation would vastly increase the cost of the Medicaid program,

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[1] Health Care Financing Admin., Dep't of Health and Human Services, *Medicaid Financial Management Report: Fiscal Year 1986* [hereinafter *Medicaid Financial Management Report*]. Of this sum, HHS provided $170.6 million to the State of Oregon.

[2] *Medicaid Financial Management Report*. Of this amount, some $20.3 million was provided to Oregon.

to the detriment of both the state and federal governments, and to the ultimate detriment of Medicaid recipients.

STATEMENT

1. Congress established the Medicaid program in 1965 "for the purpose of providing federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." *Harris* v. *McRae*, 448 U.S. 297, 301 (1980); see *Atkins* v. *Rivera*, No. 85-632 (June 23, 1986), slip op. 2; *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 36 (1981). As a cooperative federal-state program, Medicaid leaves the decision whether to participate to the sole discretion of each State. Once that initial decision has been made, States electing to participate must comply with basic requirements imposed by the Act and by the Secretary of Health and Human Services (see 42 U.S.C. (& Supp. III) 1396a; *Rivera*, slip op. 2; *Gray Panthers*, 453 U.S. at 37). Within those basic limits, however, each State has great flexibility both in administering its program and in deciding what specific provisions its program will contain.

In order to qualify for federal assistance, participating States must submit to the Secretary, and have approved, "a plan for medical assistance" (42 U.S.C. (& Supp. III) 1396a(a)). Amongs other things, such a plan must provide (42 U.S.C. (& Supp. III) 1396a(a)(13)(A)):

> for payment * * * of the hospital, skilled nursing facility, and intermediate care facility services provided under the plan through the use of rates (determined in accordance with methods and standards developed by the State * * *) which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically

> operated facilities in order to provide care and services in conformity with applicable State and Federal laws, regulations, and quality and safety standards and to assure that individuals eligible for medical assistance have reasonable access * * * to inpatient hospital services of adequate quality.

In addition, a state plan must provide "an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance * * * is denied or is not acted upon with reasonable promptness" (42 U.S.C. 1396a(a)(3)). The plan must also "provide for procedures of prepayment and postpayment claims review, including review of appropriate data * * * to ensure the proper and efficient payment of claims and management of the program" (42 U.S.C. 1396a(a)(37)(B)).[3]

2. The State of Oregon has elected to participate in the Medicaid program and has submitted to the Secretary, and had approved, a plan for medical assistance pursuant to 42 U.S.C. (& Supp. III) 1396a(a). As part of its plan, Oregon has established administrative rules that specify maximum per diem rates of reimbursement for skilled nursing and intermediate care facilities. See Pet. App. 41-43. Oregon has also established a so-called Heavy Cost Program (*id.* at 39), under which the State provides an "add-on to the facility's established rate for the client's level of care." The "heavy cost" add-on, which includes complete reimbursement for nursing staff services, food, dressings, catheters and other supplies, is made available for "functional

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[3] The Secretary's regulations under 42 U.S.C. (& Supp. III) 1396a(a)(13) elaborate on these required state review procedures, mandating that the States have an "appeals or exception procedure that allows individual providers an opportunity to submit additional evidence and receive prompt administrative review, with respect to such issues as the [state] agency determines appropriate, of payment rates." 42 C.F.R. 447.253(c). See also 42 C.F.R. 431.220(a), 431.241, 431.246.

quadriplegi[cs] * * * [who are] ready for discharge from an acute care hospital or whose care could be provided in a nursing facility in lieu of placement in an acute care hospital" (*ibid.*).

Respondents are Coos Bay Care Center, an intermediate care facility, and the guardians ad litem of three patients residing at Coos Bay. On April 27, 1984, respondents brought this class action under 42 U.S.C. 1983 to challenge Oregon's reimbursement practices for heavy-cost patients (Pet. App. 31-38). Respondents alleged that there are "a number of patients at the Coos Bay Center, and at other similar institutions within the State of Oregon, who are eligible for heavy cost care." Respondents further alleged that Oregon officials, "acting under color of state law, have developed an unconstitutional de facto policy procedure, custom and usage of consistently and repeatedly refusing to pay the cost of the heavy care patients." *Id.* at 34-35. Respondents alleged violations of the Fourteenth Amendment and of 42 U.S.C. 1396a and 1983. Respondents prayed for $138,600 in damages for Coos Bay Center, $10,000 in damages for each class member, declaratory and injunctive relief, and attorney's fees (Pet. App. 35, 37-38).

3. The district court, adopting the recommendation of a magistrate (Pet. App. 7-8), dismissed the complaint with prejudice. The magistrate concluded that the Medicaid Act "created no substantive rights" and that respondents were therefore "precluded from attempting to 'enforce' [the Act] by way of 42 U.S.C. § 1983" (Pet. App. 14).[4]

The court of appeals reversed (Pet. App. 1-5). It first held that respondents had sufficiently pleaded a violation of the Social Security Act by alleging that Oregon had

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[4] The magistrate also held that there is no private right of action under 42 U.S.C. 1396(a) and dismissed for want of federal jurisdiction respondents' state law claim for breach of contract (Pet. App. 12-13, 14-15).

"withheld * * * certain 'heavy-care' Medicaid payments" (Pet. App. 1). Starting from that premise, the court explained (*id.* at 1-2) that under this Court's decision in *Maine* v. *Thiboutot*, 448 U.S. 1 (1980), "42 U.S.C. § 1983 can provide a cause of action in federal court for the denial of rights created by a federal statute." The court of appeals acknowledged (Pet. App. 2) that this Court's subsequent decisions, such as *Pennhurst State School & Hosp.* v. *Halderman*, 451 U.S. 1 (1981), had "narrowed [*Thiboutot*] as applied to some federal statutes." But the court surmised that the reasoning of those subsequent decisions does not apply to actions, like this one, "brought to compel participating states to comply with the provisions of the Social Security Act" (Pet. App. 2). The court therefore held (*ibid.*) that "actions which properly allege violations of 42 U.S.C. § 1396a(a)(13)(A) are entitled to consideration on the merits" and that "it was not necessary to engage in a *Pennhurst* analysis."

Alternatively, the court concluded that respondents may sue Oregon in federal court "[e]ven if *Pennhurst* properly applies," since, in the court's view, the instant case implicates neither of the exceptions to Section 1983 jurisdiction that *Pennhurst* noted. First, while acknowledging that "[s]pecific and detailed procedures for administrative and judicial review [may] foreclose or preclude recourse to § 1983," the court stated that the Medicaid Act does not provide remedies that are "sufficiently precise" or comprehensive enough "to preclude remedies otherwise properly available under § 1983." Pet. App. 3. Second, the court reasoned that respondents "can enforce 42 U.S.C. § 1396a(a)(13)(A)" because they are assertedly "the intended beneficiaries of the Medicaid statutes in general and [of that Section] in particular" (Pet. App. 3, 4-5). The court accordingly held that Section 1396a(a)(13)(A) creates

an enforceable right in respondents for purposes of 42 U.S.C. 1983.[5]

SUMMARY OF ARGUMENT

The court of appeals' decision rests on three premises, each as fragile as the next. The court first held that respondents' complaint had stated a "cognizable claim for statutory entitlement" under Section 1396a(a)(13)(A) simply by alleging that Oregon "withheld * * * certain 'heavy-care' Medicaid payments." Pet. App. 1. From that initial premise the court reasoned that under *Thiboutot* a Section 1983 claim will automatically lie, regardless of the exceptions identified in *Pennhurst*. Finally, the court surmised that, assuming *Pennhurst* is relevant at all, Section 1396a(a)(13)(A) creates "enforceable rights" in respondents because respondents are among the "intended beneficiaries" of that provision. Pet. App. pp. 4.

None of these premises holds its ground. First, if the court of appeals' reading of respondents' complaint is correct, then the complaint fails for want of federal jurisdiction, since no part of the complaint would implicate federal law. Second, there is no support in this Court's

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[5] The court of appeals did not address whether, and to what extent, respondents would be entitled to a remedy if they were to prevail on the merits following remand. We note, however, that the Eleventh Amendment would plainly rule out respondents' prayer for retroactive damages against Oregon (see, *e.g.*, *Edelman* v. *Jordan*, 415 U.S. 651 (1974)), as well as against petitioner Ladd "if 'the judgment sought would expend itself on the public treasury or domain' " (*Dugan* v. *Rank*, 372 U.S. 609, 620 (1963) (citation omitted)). Moreover, respondents' claim for injunctive relief against the Department would seem to be barred as well. As this Court has observed, "in the absence of consent a suit in which * * * one of [the State's] agencies or departments is named as the defendant is proscribed by the Eleventh Amendment" and this is true "regardless of the nature of the relief sought" (*Pennhurst State School & Hosp.* v. *Halderman* (*Pennhurst II*), 465 U.S. 89, 100 (1984) (citations omitted)).

decisions for the idea that the *Pennhurst* analysis is generically inapplicable in litigation concerning the Social Security Act. Third, if one assumes that there is a plausible reading of respondents' complaint that does invoke federal law, their claim again fails, because Section 1396a(a)(13)(A) simply does not create "enforceable rights" in respondents for purposes of Section 1983. The language of Section 1396a(a)(13)(A) does not establish a mandatory obligation that is suited to private enforcement; and the history of the Section, and its construction by the Secretary, reveal that Congress did not intend to establish such enforceable rights. Respondents seek to transform what is, at bottom, a typical Medicaid reimbursement dispute under state law into a federal controversy under Section 1983, and the court of appeals' decision permitting that transformation should be reversed.[6]

ARGUMENT

THE COURT OF APPEALS ERRED IN HOLDING THAT RESPONDENTS MAY SUE THE STATE OF OREGON UNDER SECTION 1983 FOR AN ALLEGED VIOLATION OF 42 U.S.C. 1396a(a)(13)(A)

A. As a Threshold Matter, It is Unclear That Respondents Have Actually Pleaded A Violation Of The Social Security Act

Under 42 U.S.C. 1983, any person who is deprived "of any rights, privileges, or immunities secured by the Constitution and laws" by a person acting under color of state law may bring a private action to seek redress. In *Maine* v.

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[6] Because Section 1396a(a)(13)(A) does not create an enforceable right for purposes of 42 U.S.C. 1983, there is no need for this Court to reach the question whether Congress, by mandating state administrative review procedures under Section 1396a(a)(37)(B), has created alternative remedies sufficient to foreclose enforcement through 42 U.S.C. 1983. See *Pennhurst*, 451 U.S. at 28; *Middlesex County Sewerage Auth.* v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 19 (1981).

Thiboutot, 448 U.S. 1 (1980), this Court held that the phrase "and laws" in Section 1983 must be read literally, so as to create a private cause of action against state officials for violations of rights created by federal statutes. In this case, the court of appeals concluded that respondents did in fact plead a violation of the Social Security Act by alleging that Oregon officials had "withheld from [respondents] certain 'heavy-care' Medicaid payments and reimbursements" (Pet. App. 1, 5).

As a threshold matter, we confess some uncertainty about whether respondents have actually pleaded a violation of the Social Security Act in this case. The court of appeals seems to have believed (Pet. App. 1) that respondents sufficiently pleaded a federal statutory violation simply by alleging that Oregon should have reimbursed Coos Bay Center at a higher rate for services rendered to particular individuals. Under that view, however, virtually any disagreement over a state Medicaid reimbursement decision would give rise to a Section 1983 cause of action. Plainly, that cannot be so. As this Court has stressed in a related context, an action can be deemed to "arise under" the laws of the United States only if the plaintiff establishes, at a minimum, "that its right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties" (*Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 13 (1983) (construing 28 U.S.C. 1331)). Where the only issue in dispute between the parties is whether the State has correctly construed its own Medicaid plan, no question of federal law is even implicated, let alone as "a necessary element of one of the well-pleaded state claims" (*ibid.*); see also *Merrell Dow Pharmaceuticals Inc.* v. *Thompson*, No. 85-619 (July 7, 1986), slip op. 9; *Gully* v. *First Nat'l Bank*, 299 U.S. 109, 115 (1936).

The mere fact that Oregon adopted its plan in order to participate in the federal Medicaid program, moreover, cannot convert into a federal statutory violation what is, at

bottom, only a dispute about the proper application of state law. As the Second Circuit noted in *Oberlander* v. *Perales,* 740 F.2d 116, 119 (1984), there is "no authority anywhere supporting the proposition that a state Medicaid regulation becomes a federal law merely by virtue of its inclusion in a state plan required by federal law." See also *Merrell Dow Pharmaceuticals Inc.*, slip op. 10-11 n.12; *Shulthis* v. *McDougal,* 225 U.S. 561, 569-570 (1912); *Shoshone Mining Co.* v. *Rutter,* 177 U.S. 505, 507 (1900).

If respondents in fact have pleaded merely a violation of state law in this case, that defect is obviously fatal to their claim of federal jurisdiction. As this Court held in *Pennhurst State School & Hosp.* v. *Halderman* (*Pennhurst II*), 465 U.S. 89, 106 (1984), "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." "Such a result," the Court stated, "conflicts directly with the principles of federalism that underlie the Eleventh Amendment" (465 U.S. at 106).

Apparently recognizing the vulnerability of the court of appeals' view of their complaint, respondents have ventured (Br. in Opp. 14) a different characterization. "The crux of the Complaint in this case," respondents say, "was that the payment rates established by Oregon pursuant to its participation in the Medicaid program were not reasonable or adequate," in purported violation of the standard set by Section 1396a(a)(13)(A). But this characterization of the complaint founders on the fact that Section 1396a(a)(13)(A) does not establish an objective federal standard of "reasonable reimbursement" to which participating States must conform. Indeed, as we explain below, Section 1396a(a)(13)(A) leaves it to the States to determine what level of reimbursement is "reasonable," and the legislative history shows that Congress deliberately sought to avoid imposing on the States an inflexible federal standard in this respect.

B. Even If Respondents Have Sufficiently Pleaded A Violation Of 42 U.S.C. 1396a(a)(13)(A), That Section Does Not Create Enforceable Rights Under Section 1983

1. There is no Section 1983 cause of action to enforce a federal statute unless Congress intended the statute to create enforceable rights

a. One year after its decision in *Thiboutot*, this Court, in its first *Pennhurst* decision, "recognized two exceptions to the application of § 1983 to statutory violations." *Middlesex County Sewerage Auth.* v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 19 (1981), citing *Pennhurst State School & Hosp.* v. *Halderman*, 451 U.S. 1 (1981). In particular, the Court held that a Section 1983 action will not lie where (1) Congress has foreclosed private enforcement of the federal statute in the statute itself, or (2) the statute does not create "enforceable rights" under Section 1983. *Sea Clammers*, 453 U.S. at 19; *Pennhurst*, 451 U.S. at 28; see also *Wright* v. *City of Roanoke Redevelopment & Housing Auth.*, No. 85-5915 (Jan. 14, 1987), slip op. 5.

The contours of the "enforceable rights" exception were laid out in *Pennhurst* itself. The plaintiffs there brought an action under the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. 6000 *et seq.*, to challenge the conditions at a state-operated facility for the mentally retarded. Plaintiffs relied on several sections of the Act. The first of these, Section 6010 (the so-called "bill of rights" provision), set out a series of "findings respecting the rights of persons with developmental disabilities" (42 U.S.C. 6010 (quoted in 451 U.S. at 13)). Plaintiffs also relied on provisions of the Act that required participating States, as a condition of the receipt of federal funds, to make "assurances" to the Secretary that they had a habilitation plan in effect for the retarded (Section 6011) and that their programs protected their patients' human rights (Section 6063(b)(5)(C)).

Rejecting plaintiffs' claims, the Court held, first, that Section 6010 "does not create substantive rights" and "does no more than express a congressional preference for certain kinds of treatment" (451 U.S. at 11, 19). Rather than imposing "binding obligations on the States," the Court explained, Section 6010 "spoke merely in precatory terms" and simply offered "congressional 'encouragement' of state programs" (451 U.S. at 18, 27). Turning to Sections 6011 and 6063(b)(5)(C) of the Act, which the courts below had not addressed, this Court remanded to the court of appeals for further consideration (451 U.S. at 30). But the Court noted that plaintiffs under those Sections "can claim only that the state plan has not provided adequate 'assurances' to the Secretary" (*id.* at 28). "It is at least an open question," the Court stated, "whether an individual's interest in having a State provide those 'assurances' is a 'right secured' by the laws of the United States within the meaning of § 1983" (451 U.S. at 28).

The Court applied the "enforceable rights" exception more recently in *Wright* v. *City of Roanoke Redevelopment and Housing Auth.*, No. 85-5915 (Jan. 14, 1987). In that case, tenants living in housing projects owned by a city redevelopment authority brought suit under Section 1983, alleging that the city had violated a rent ceiling imposed by the Brooke Amendment to the Housing Act of 1937, Pub. L. No. 91-152, § 213, 83 Stat. 389, and implementing HUD regulations. The Court held that the Brooke Amendment did create "enforceable rights," explaining that the Amendment "could not be clearer" in setting an upper limit on chargeable rents and in establishing "a mandatory limitation focusing on the individual family and its income" (slip op. 12). The Court also stated that the standard set by the Amendment and its acompanying regulations was not "too vague and amorphous to confer on tenants an enforceable 'right,' " since the Amendment and regulations, taken together, "specifically set out

guidelines that the [housing authorities] were to follow" (*id.* at 13). The Court accordingly determined that "the benefits Congress intended to confer on tenants are sufficiently specific and definite to qualify as enforceable rights under *Pennhurst* and § 1983" (slip op. 13-14).

The court of appeals in the instant case concluded that "it was not necessary to engage in a *Pennhurst* analysis," hypothesizing that "*Thiboutot* still governs actions brought to compel participating states to comply with the provisions of the Social Security Act" (Pet. App. 2). The court of appeals' conclusion does not follow from its premise. It is true, of course, that *Thiboutot* "governs" this action in the sense that *Thiboutot* holds that statutory violations may give rise to Section 1983 claims. But *Pennhurst* qualified that governing principle, and this Court has never suggested that the two exceptions recognized in *Pennhurst* are for some reason inapplicable when the statute in question is the Social Security Act. Indeed, since *Pennhurst* was decided, this Court has routinely applied the two *Pennhurst* exceptions, without once intimating that those exceptions apply only to certain statutes but not others. See *Wright,* slip op. 5; *Sea Clammers,* 453 U.S. at 19. See also *Silver* v. *Baggiano,* 804 F.2d 1211, 1215-1218 (11th Cir. 1986) (applying *Pennhurst* exceptions to a Section 1983 claim under the Social Security Act). Contrary to the court of appeals' statement, therefore, it is "necessary to engage in a *Pennhurst* analysis."

b. In deciding whether a federal statute creates "enforceable rights" under *Pennhurst,* a court may not—as the court of appeals did in this case (Pet. App. 4)—ask simply whether the plaintiffs are the "intended beneficiaries" of the particular statute. Certainly, persons with developmental disabilities were the "intended beneficiaries" of the statute at issue in *Pennhurst,* but this Court's opinion makes clear that that is not sufficient. A statute may intentionally benefit a particular person or

class of persons, without creating "specific and definite" rights on their part (*Wright*, slip op. 14), and without designating them as the appropriate agents to enforce whatever rights exist. See Brown, *Pennhurst As A Source Of Defenses For State And Local Governments,* 31 Cath. U.L. Rev. 449, 459 (1982). In determining whether private parties may sue to enforce a statute, this Court has stated, "[t]he question is not simply who would benefit from the Act, but whether Congress intended to confer rights upon those beneficiaries" (*California* v. *Sierra Club,* 451 U.S. 287, 294 (1981)). In answering this question, a court must look, as this Court did in *Pennhurst* and in *Wright,* to the language and history of the statute to discern whether Congress clearly intended to create a "specific and definite" right and to authorize private enforcement of that right. Several principles should guide the court's approach.

First and foremost, the language of the statute must be mandatory and narrow in order to create an enforceable right. As this Court has explained in a related context, the "right- or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action" (*Cannon* v. *University of Chicago,* 441 U.S. 677, 690 n.13 (1979)). The courts must therefore "distinguish statutory provisions that announce broad policy goals or general preferences from those that dictate specifically what the relevant governmental officials may and may not do" (*Edwards* v. *District of Columbia,* No. 85-6150 (D.C. Cir. June 12, 1987), slip op. 11). Applying that distinction, "the courts of appeals in the aftermath of *Pennhurst* have, for the most part, upheld rights claims in statutes that dictate specific action and leave little room for choice, while rejecting rights claims in statutes that merely indicate broad preferences" (*ibid.*). This Court itself has recently stated that a statutory obligation must be "specific and definite" in

order to create an enforceable right (*Wright,* slip op. 14), and the courts of appeals have similarly reasoned that the statute must be "cast in the imperative" (*Alexander* v. *Polk,* 750 F.2d 250, 259 (3d Cir. 1984)), and must "clearly impose[] an affirmative obligation" (*Polchowski* v. *Gorris,* 714 F.2d 749, 751 (7th Cir. 1983)).[7]

Second, a court must consider the nature of the federal standard imposed by the statute. Where, for example, the statute imposes an open-ended standard of "reasonableness," a court should be reluctant to conclude that Congress intended to authorize federal courts to superintend a state's compliance with that standard. See generally Sunstein, *Section 1983 and the Private Enforcement of Federal Law,* 49 U. Chi. L. Rev. 394, 428-430 (1982).

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[7] The D.C. Circuit's recent decision in *Edwards* v. *District of Columbia, supra,* demonstrates, in our view, an appropriate consideration of statutory language in applying the "enforceable rights" exception. Plaintiffs there sued a local public housing agency for its alleged failure to comply with certain conditions imposed by federal law for the demolition of a federally funded housing project. Although the Secretary of HUD had not approved an application to demolish the project, plaintiffs asserted that the statutory conditions on demolition imposed independent duties on the local agency that tenants were entitled to enforce under Section 1983. The court of appeals rejected the claim and ordered dismissal of the complaint. Concluding that the federal housing statute did not create an enforceable right, the court properly distinguished between "broad policy goals" and mandatory, right-creating provisions (slip op. 11):

> While policy goals and general preferences leave much room for governmental officials to determine the means by which these goals and preferences are to be carried out, and therefore are ambiguous regarding what duties are owed to which citizens, specific language of obligation narrowly cabins the discretion of officials, and, by the same terms, secures rights to a specific class of people.

The court reviewed the language and legislative history of the statute and held that the obligations relied on by the plaintiffs were simply conditions precedent to the Secretary's grant of a demolition application; they did not create enforceable obligations independent of the application process.

Especially is that so where, as here, Congress has expressly provided for administrative review of claims by state agencies under such a "reasonableness" formula. See 42 U.S.C. 1396a(a)(37)(B); cf. *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 487-491 (1951). State administrative agencies, which deal on a day-to-day basis with the intricacies of their own grant programs, are obviously well suited to ascertain what is "reasonable" under all the circumstances, and that fact should make a federal court particularly reluctant to second-guess the State's assessment.

2. ***Section 1396a(a)(13)(A) was not designed to create enforceable rights for purposes of 42 U.S.C. 1983***

a. Section 1396a(a)(13)(A) does not read like a statute designed to "dictate specifically what the relevant governmental officials may and may not do" (*Edwards,* slip op. 11). Far from containing "right- or duty-creating language" (*Cannon* v. *University of Chicago,* 441 U.S. at 690 n.13), Section 1396a(a)(13)(A) permits participating States to devise reimbursement rates "which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities * * *." The statute further provides that such rates may be set "in accordance with methods and standards developed by the State." By its terms, therefore, Section 1396a(a)(13)(A) vests rate-making discretion entirely in the States, subject only to the condition that they make "assurances" satisfactory to the Secretary. As this Court wrote in *Pennhurst*, "[i]t is at least an open question whether an individual's interest in having a State provide * * * 'assurances' [to the Secretary] is a 'right secured' by the laws of the United States within the meaning of § 1983" (451 U.S. at 28).

Moreover, the standard of "reasonableness" set forth in the statute shows that Congress did not intend the federal

courts to monitor the States' compliance by way of Section 1983. This Court in *Wright* concluded that the Brooke Amendment and its implementing regulations created enforceable rights because they "specifically set out guidelines that the [housing authorities] were to follow in establishing utility allowances" (slip op. 13). Here, by contrast, Section 1396a(a)(13)(A) provides in general terms that the State must find, and assure the Secretary, only that its reimbursement rates are "reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable State and Federal laws * * *." The implementing regulations reiterate this broad standard, leaving the States with freedom to structure reimbursement systems tailored to their own objectives.[8] Nowhere in the statute can one find the "specific language of obligation [that] narrowly cabins the discretion of officials, and, by the same terms, secures rights to a specific class of people" (*Edwards,* slip op. 11). Rather, "[t]he subsection is essentially administrative in nature" (*Polchowski* v. *Gorris,* 714 F.2d at 751), entrusting to the individual States the duty to define and implement what is a "reasonable" reimbursement system.

b. The legislative history of Section 1396a(a)(13)(A) confirms that Congress did not intend, as respondents suggest (Br. in Opp. 14), to create in Medicaid providers and their patients an enforceable right to "reasonable" reimbursement payments. To the contrary, the history of the statute reveals that Congress sought deliberately to avoid

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[8] Thus, 42 C.F.R. 447.252(a), on which respondents in their complaint relied (Pet. App. 34), provides simply that the state plan "must provide that the requirements of this subpart [implementing Section 1396a(a)(13)(A)] are met." 42 C.F.R 447.253, which elaborates the requirements for "state assurances" under Section 1396a(a)(13)(A), merely requires state Medicaid agencies to "make" * * * findings" that their Medicaid payment rates are "reasonable and adequate."

saddling state reimbursement decisions with cumbersome federal oversight. In view of that history, it cannot plausibly be contended that Congress expected private persons to enforce their own views of appropriate Medicaid rate-setting under the aegis of a Section 1983 action in federal court.

In 1972 Congress enacted a "reasonable cost" formula for making Medicaid reimbursements to intermediate care facilities like Coos Bay Center. Codified at the time in 42 U.S.C. (Supp. II 1972) 1396a(a)(13)(E), this statute required participating States to include in their Medicaid plans a provision "for payment of the skilled nursing facility and intermediate care facility services provided under the plan on a reasonable cost related basis." Social Security Amendments of 1972, Pub. L. No. 92-603, § 249(a), 86 Stat. 1426. This provision, linking reimbursement to facilities' actual costs, "was designed to assure that payment rates would more closely reflect the reasonable costs necessary to provide * * * services of adequate quality" (S. Rep. 96-471, 96th Cong., 1st Sess. 28 (1979)).

In 1979, however, Congress concluded that the "reasonable cost" reimbursement formula was no longer "entirely satisfactory" (S. Rep. 96-471, *supra*, at 28). Congress found that requiring States to adopt that formula had proved to be "inherently inflationary" and "contain[ed] no incentives for efficient performance" (*ibid.*). In 1980, therefore, Congress abandoned the "reasonable cost" reimbursement system and adopted the so-called Boren Amendment now embodied in Section 1396a(a)(13)(A). Omnibus Budget Reconciliation Act of 1980, Pub. L. No. 96-499, § 962(a), 94 Stat. 2650-2651.[9]

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[9] In 1981 Congress abandoned the "reasonable cost" reimbursement formula for hospitals as well, providing that hospitals, like nursing homes and intermediate care facilities, should be governed thenceforth by the revised standard now incorporated in 42 U.S.C.

The Boren Amendment "represented a significant change in the federal [reimbursement] standard," offering the States an opportunity to effect "more stringent cost containment" while freeing them from excessive "federal oversight of [their] reimbursement methodologies" (*Wisconsin Hospital Ass'n* v. *Reivitz,* 733 F.2d 1226, 1228 (7th Cir. 1984)). Congress chose to "give[] the States flexibility and discretion * * * to formulate their own methods and standards of payment" (S. Rep. 96-471, *supra,* at 28-29).[10] By the same token, Congress intended that the degree of federal oversight should be significantly reduced. While pointing out that the Secretary would continue to insist on "assurances * * * that the payment rates * * * are reasonable and adequate," Congress "expect[ed] that the Secretary will keep regulatory and other requirements to that minimum necessary to assure proper accountability, and not overburden the States and facilities with marginal but massive paperwork requirements" (*id.* at 29).

In enacting the Boren Amendment, therefore, Congress made clear that it did not envision rigorous federal scrutiny of the States' "assurances" under Section 1396a(a)(13)(A). To the contrary, Congress "expected that the assurances made by the States will be considered satisfactory in the absence of a formal finding to the contrary by the Secretary." S. Rep. 96-471, *supra,* at 29. See

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1396a(a)(13)(A). See Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 2173(a), 95 Stat. 808. See generally *Wisconsin Hospital Ass'n* v. *Reivitz,* 733 F.2d 1226, 1228 (7th Cir. 1984).

[10] There was no Senate or House report accompanying the Boren Amendment in 1980. Floor discussion on the Amendment, however, makes clear that it was drawn from a bill reported the previous year by the Senate Finance Committee. See 126 Cong. Rec. 17885-17886 (1980). The Boren Amendment does not materially differ from the provision contained in the 1979 bill. See S. Rep. 96-471, *supra,* at 157-158. For that reason, we have set out in the text the relevant portions of the Senate report that accompanied the 1979 bill.

also 126 Cong. Rec. 17886 (1980) (Sen. Boren) ("[P]ayment methods adopted by the States will carry a presumption of compliance."). ~~Indeed~~, the 1980 Conference Report stated that "[i]f, within 90 days of receiving the rates proposed to be used by a State, the Secretary has not made a final determination that the rates proposed meet all applicable requirements of medicaid law, then the rates would be presumed to meet the medicaid law requirements for the fiscal year for which they were imposed" (H.R. Conf. Rep. 96-1479, 96th Cong., 2d Sess. 154 (1980)). Consistently with this legislative history, the Secretary has maintained that Section 1396a(a)(13)(A) does not require him to analyze or verify the State's findings, but only to satisfy himself that there is a reasonable basis on which the State's assurances may be accepted.

The Boren Amendment, in short, was designed to promote two closely connected purposes. First, in order to reduce the cost of participating in the Medicaid program, the Amendment freed the States of the constraints previously imposed by the "reasonable cost" formula, and allowed state agencies "to establish rates on a statewide or other geographical basis, a class basis, or an institution-by-institution basis" (S. Rep. 96-471, *supra,* at 29). Second, the Amendment was intended to reduce the degree of federal oversight, on the theory that excessive federal scrutiny had "overburden[ed] the States and facilities with marginal but massive paperwork requirements" (*ibid.*). In light of these purposes—carefully reflected in the plain language of Section 1396a(a)(13)(A)—it is difficult to imagine that Congress intended to authorize federal courts, in actions brought against the States under Section 1983, to develop and apply a federal common law respecting the "reasonableness" of Medicaid reimbursement rates.

The legislative history of Section 1396a(a)(13)(A) thus confirms what its language clearly suggests—that Congress in enacting that statute did not intend to confer on

Medicaid providers and patients an "enforceable right" to challenge state reimbursement decisions in federal court. Lawsuits like respondents' interfere with state autonomy and discretion, and they contravene Congress's intent that the degree of federal oversight should be minimized. There is no reason to believe that Congress wished the participating States to absorb the substantial costs entailed by such litigation.[11]

c. This Court observed in *Wright* (slip op. 9) that "HUD's opinion as to available tenant remedies under the Housing Act is entitled to some deference by th[e] Court."

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[11] Four years prior to the Boren Amendment, Congress had amended the Social Security Act to repeal 42 U.S.C. (Supp. V 1975) 1396a(g), a provision that had required participating States to waive their Eleventh Amendment immunity from suits brought with respect to Medicaid payment for inpatient hospital services. Act of Oct. 18, 1976, Pub. L. No. 94-552, 90 Stat. 2540; see H.R. Rep. 94-1122, 94th Cong., 2d Sess. 1 (1976); S. Rep. 94-1240, 94th Cong., 2d Sess. 1 (1976). Congress repealed that provision, which had been enacted just the previous year, because it had "require[d] States to waive one of their basic rights" and had resulted in "an unreasonable burden of suits which [had been] costly in terms of time and legal manpower, and which [had made] efficient program administration virtually impossible" (H.R. Rep. 94-1122, *supra*, at 4). The House and Senate reports observed in passing that, after the repeal, "providers can continue * * * to institute suit for injunctive relief in State or Federal courts, as necessary." *Id.* at 7 (letter from Department of HEW); S. Rep. 94-1240, *supra*, at 4. These remarks, however, cannot determine the availability of a Section 1983 cause of action under Section 1396a(a)(13)(A) as it now exists. As noted above (page 18 and note 9, *supra*), Congress substantially revised that Section in 1980 and 1981 for the express purpose of conferring greater discretion upon the individual States in structuring their reimbursement systems, while at the same time reducing significantly the degree of federal oversight. Whatever federal remedies may have been available to Medicaid providers under the old "reasonable cost" reimbursement system, therefore, did not survive Congress's substantial revision of Section 1396a(a)(13)(A) in 1980.

See also *Cannon* v. *University of Chicago,* 441 U.S. at 687-688 & n.8, 701, 702. In the present case, the Secretary has considered the availability of private rights of action to enforce Section 1396a(a)(13)(A) and has concluded that no such rights exist.

In September 1981 the Secretary published interim final regulations designed to implement the legislation now codified in Section 1396a(a)(13)(A). See 46 Fed. Reg. 47964. In December 1983, after receiving public comments on those interim final rules, the Secretary published a set of revised regulations. See 48 Fed. Reg. 56046. The Secretary also set out a "preamble" designed to address the "concerns raised in the[] comments" (*id.* at 56047).

One commentor had addressed the precise issue presented in this case. He proposed that the federal government "require States to provide judicial recourse for providers dissatisfied with State payment rates" (48 Fed. Reg. 56052 (1983)). The Secretary rejected that suggestion (*ibid.*), concluding that there was no statutory license to impose such a requirement on the States:

> [A]bsent any statutory mandate, there is no Federal authority to require judicial recourse (presumably in State courts) for providers dissatisfied with State payment rates. Of course, under both the current and revised regulations, providers are free to pursue whatever judicial remedies are available in their States after they have exhausted the administrative appeal process.

The Secretary's conclusion that federally mandated "judicial recourse" is both unwarranted and unwise is entitled to deference in deciding whether Congress intended to authorize private actions to challenge state Medicaid reimbursement decisions under Section 1983.[12]

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[12] The Secretary's conclusion that judicial enforcement actions are inappropriate is consistent with his more general determination, stated

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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throughout the preamble to the final regulations, that the federal government should avoid excessive interference with the States' rate-setting authority under the Medicaid program. For example, several commentors had proposed that the Secretary "be more explicit as to [the federal] criteria for review of State assurances" (48 Fed. Reg. 56050 (1983)). The Secretary rejected this suggestion (*ibid.*), finding that "such a list of criteria may be viewed as imposing Federal standards for payment rates, an effect that would be contrary to the legislative intent." For the same reason, the Secretary rejected a proposal that the federal government define the term "efficiently and economically operated facility" as used in Section 1396a(a)(13)(A). See 48 Fed. Reg. 56049 (1983). As the Secretary put it (*ibid.*), "we believe any Federal attempt to impose specific definitions would unnecessarily intrude upon the legislatively mandated flexibility provided to States under the statute."

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